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NFU Draft Reply to EBA Consultation on Sound Remuneration Guidelines

Q 1: Are the definitions provided sufficiently clear; are additional definitions needed?

In general, the definitions are clear, apart from the definition (m) 'vests'.

The definition of "vests" (m) should be clarified in relation to the definitions of "retention period" (q) and 'clawback' (s). If a remuneration is legally owned (vested), how can it be retained, as the retention period is defined as a period when a remuneration cannot be sold or accessed and may not be paid out if the staff leaves? In addition, if remuneration is subject to clawback, it may happen that it does not get paid out at all.

Q 2: Are the guidelines in chapter 5 appropriate and sufficiently clear?

The use of external benchmarks in order to retain staff contributes to a disconnection of the objectives of the institution regarding risk strategy, corporate culture and values and the long term interests of the institution. These factors are not mentioned in the Guidelines under chapter 5.

There should also throughout the chapter, and in the paper as such, be a much sharper distinction between the treatment of normal wages for ordinary employees on the one hand, and the remuneration of high ranking risk takers and managerial staff on the other. This relates both to the involvement of e.g. compliance, as well as shareholders. In relation to ordinary wages there are no special systemic or other special issues that makes it relevant for detailed involvement of compliance, shareholders etc. A more general oversight should be appropriate for this part of the wage structure. Likewise, this also makes it more difficult to see any need to recommend voluntary expansions of the rules for identified staff to ordinary employees.

Under chapter 6 'Governance', §20, the statement is made that "conflicts of interest between remuneration policy and remuneration awarded should be identified". This is not totally clear. Does this mean that a discrepancy between theory (policy) and practice (award) should be avoided? Perhaps "**discrepancies** between a remuneration policy and remuneration…"

With regards to both chapter 5 and 6 (as Q3 is not applicable to chapter 6.1) a reference to collective bargaining is clearly missing. The social partners can, and must be allowed to, assume the responsibility of sound and sustainable remuneration principles. NFU strongly supports the idea of remuneration policies and practices that are consistent with and promote sound and effective risk management, but believes that remuneration policies should be left to the social partners to decide upon, since pay is, according to art. 153.5 in the Treaty on the Functioning of the European Union (TFEU), not for the EU to deal with. It must thus be made clear that any legal provisions regarding remuneration do not apply to remuneration policies and provisions agreed in a collective agreements. The right of social partners is part of the legislative basis in the previous remuneration guidelines by CEBS in 2010. It is therefore

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regrettable that EBA has failed to include the role of collective agreements in its draft guidelines even though a clear reference is found in CRD 4, Recital 69:

"The provisions on remuneration should be without prejudice to the full exercise of fundamental rights guaranteed by Article 153(5) TFEU, general principles of national contract and labour law, Union and national law regarding shareholders' rights and involvement and the general responsibilities of the management bodies of the institution concerned, and the rights, where applicable, of the social partners to conclude and enforce collective agreements, in accordance with national law and customs."

An explicit reference to recital 69 must therefore be included in the Guidelines.

It is also important to stress that by far the greatest part of the employees in the financial sector do not receive excessively large bonuses or other kinds of variable remuneration which give rise to systemic issues. Also, it is not unusual that variable remuneration in a bank is only used for staff at or above the "identified staff" level.

As a basic principle, NFU supports for remuneration policies the absolute primacy of collective agreements. It must thus be made clear that any legal provisions regarding remuneration do not apply to remuneration policies and provisions agreed in a collective agreement.

Both fixed and certain types of variable remuneration can be regulated through collective agreements which is why it is crucial that the provisions on pay by EBA do not interfere with the rights and responsibilities of social partners to conclude and enforce collective agreements. In this regard it is equally important to acknowledge that it is not only remuneration policies and variable pay that can create risk incentives for staff. Also non-monetary merit rating systems and aggressive sales targets are reasons for stress among the employees that can result in miss-selling. These types of systems are not driven by monetary incentives but can instead affect the overall salary or position of the employee at the company. With reference to paragraphs 11 and 12 it is therefore important to recognize also the company culture and the role of management in creating both positive and negative incentives and risks for staff.

After attending the Public Hearing by EBA on May 8 where the issue of collective bargaining was raised several times, NFU is happy to explain for EBA what collective bargaining is and why the EBA guidelines on remuneration is likely to have an effect on the rights of social partners. The Nordic model of collective bargaining presupposes that it is the social partners who are best placed to set wages and working conditions for employees. In the Nordic Area, it is the social partners and trade unions which work with wage formation, through collective bargaining by the partners. The state does not participate in wage formation but creates the preconditions for the partners to do their job. Wage formation through collective agreements in free negotiations between the social partners is a fundamental cornerstone of the Nordic model.

Examples on effects of the CEBS guidelines are provided under Q 5. The overall problem has been the very broad interpretation of who is a "risk taker" where far too many have employees have been defined as such.

Further comments on Chapter 6.1:

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It is key to take employee representation into consideration and the possibilities to include employee representatives in setting and designing the remuneration policy. Employee representatives are an asset in a company's governance functions as they have shop floor experience, knowledge and expertise about the company. This also recognized in CRD 4, recital 60:

"Employee representation in management bodies may also, by adding a key perspective and genuine knowledge of the internal workings of the institutions, be seen as a positive way of enhancing diversity."

Q 3: Are the guidelines regarding the shareholders' involvement in setting higher ratios for variable remuneration sufficiently clear?

It has to be ensured that the shareholders involvement is limited to decisions on the remuneration concerning management and identified key persons at a company and not of the overall staff. The provisions regarding shareholders involvement are otherwise clear. However, NFU regrets that no mention is made of stakeholders' involvement, and specifically the involvement of trade unions or employee representatives in the decision of this issue.

Q 4: Are the guidelines regarding remuneration policies and group context appropriate and sufficiently clear?

NFU is pleased to see that EBA under para 42 refers to employee representation in the remuneration committee. We would however prefer a more extensive wording than as currently written; a possibility only if provided by national law. Employee representation in governance bodies such as remuneration committees should be possible also if there is a *culture and/or practice of employee representation in the company or Member State*.

Again, employee representation in governing bodies contributes to sound and effective corporate governance. Employees are interested in the long-term performance of the company and thus contribute to sustainable business models and sound remuneration policies.

Q 5: All respondents are welcome to provide their comments on the chapter on proportionality, with particular reference to the change of the approach on 'neutralisations' that was required following the interpretation of the wording of the CRD. In particular institutions that used 'neutralisations' under the previous guidelines for the whole institution or identified staff receiving only a low amount of variable remuneration are asked to provide an estimate of the implementation costs in absolute and relative terms and to point to impediments resulting from their nature, including their legal form, if they were required to apply, for the variable remuneration of identified staff: a) deferral arrangements, b) the pay out in instruments and, c) malus (with respect to the deferred variable remuneration). In addition those institutions are welcome to explain the anticipated changes to the remuneration policy which will need to be made to comply with all requirements. Wherever possible the estimated impact and costs should be quantified, supported by a short explanation of the methodology applied for their estimation and provided separately for the three listed aspects.

As a basic principle, the possibility for collective bargaining should not be hampered by the inclusion of too vast a number of employees, including those in middle management functions which are not immediately concerned by risk taking. This is an issue of proportionality, especially in small or medium sized institutions which do not have a significant market activity.

For example, in Belgium there has been a case of a minor financial institution where the guidelines on remuneration were interpreted so broadly that all professional and managerial staff were asked to sign an accord in which they agreed on a clawback procedure. This was in terms of an interpretation by the bank itself of the Belgian law which implement European legislation. After consultation with a trade union and through that trade union's research department who had contacted the National Competent Authorities (Ministry and Supervisor), the bank agreed to narrow down the application of those rules.

While the interpretation itself is too broad an interpretation both of the scope of European and of Belgian legislation, it shows the need to provide a clear indication of scope.

We also have examples from Sweden where a very large percentage (more than 50 percent) of all employees are defined as risk takers. This is not the intent of the directive and the FSA:s and the banks need a much clearer guidance that more than around 10 percent employees defined as risk takers would only occur in special cases.

There are also examples of very small financial institutions with one or a few employees that have to appoint risk and compliance officers and report detailed information on e.g. remuneration rules to the supervisory authorities. This is all together is a huge administrative burden for very small financial institutions.

Q 6: Are the guidelines on the identification of staff appropriate and sufficiently clear?

It would be easier to understand the Guidelines if the RTS on identification criteria (Commission Delegated Regulation (EU) N° 604/2014) were clearly referenced in the text or attached in an annex to the Guidelines.

Q 7: Are the guidelines regarding the capital base appropriate and sufficiently clear?

Non-applicable

Q 8: Are the requirements regarding categories of remuneration appropriate and sufficiently clear?

We are positive to the mentioning of collective bargaining under para 117.e. However, as abovementioned, it must be stressed that according to TFEU Art. 153, 5, and as stated in CRD 4, Recital 69, the EU cannot interfere with collective bargaining.

Q 9: Are the requirements regarding allowances appropriate and sufficiently clear?

In the Nordic countries it is the social partners that decide on the criteria and levels of remuneration that applies to a large amount of employees at a company. The provisions on remuneration should be without prejudice to the full exercise of fundamental rights guaranteed by Article 153(5) TFEU

Q 10: Are the requirements on the retention bonus appropriate and sufficiently clear?

It must be stressed that the provisions on remuneration should be without prejudice to the full exercise of fundamental rights guaranteed by Article 153(5) TFEU and CRD 4, Recital 69.

Q 11: Are the provisions regarding severance payments appropriate and sufficiently clear?

Although we are aware that the severance payments mentioned under this paragraph may have a different scope, the provisions regarding severance payments should include a reference to national law. Generally, severance payments/payment of early termination of contracts are regulated under labour law.

Q 12: Are the provisions on personal hedging and circumvention appropriate and sufficiently clear?

Non-applicable

Q 13: Are the requirements on remuneration policies in section 15 appropriate and sufficiently clear?

We agree with paragraph 178, that the fixed remuneration should be sufficiently high so that the variable remuneration could go down to zero and the staff would still be able to make a decent living wage.

Under para 180, EBA should add a reference to collective agreements: "…in line with the limits and procedures provided in Article 94 (1) (g) of the CRD, national law and collective agreements,…".

Q 14: Are the requirements on the risk alignment process appropriate and sufficiently clear?

Non-applicable

Q 15: Are the provisions on deferral appropriate and sufficiently clear?

Non-applicable

Q 16: Are the provisions on the award of variable remuneration in instruments appropriate and sufficiently clear? Listed institutions are asked to provide an estimate of the impact and costs that would be created due to the requirement that under Article 94(1)(l)(i) CRD only shares (and no share linked instruments) should be used in parallel, where possible, to instruments as set out in the RTS on instruments. Wherever possible the estimated impact and costs should be quantified and supported by a short explanation of the methodology applied for their estimation.

Non-applicable

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Q 17: Are the requirements regarding the retention policy appropriate and sufficiently clear?

Non-applicable

Q 18: Are the requirements on the ex post risk adjustments appropriate and sufficiently clear?

No. This is due to the initial definitions of vested, awarded. For example under paragraph 266,it is not clear how 100% of the variable remuneration can be clawed back, especially if it has been paid out already. Under the same paragraph there should also be a reference to collective agreements along with national contracts and labour law.

In principle, to reduce or reverse any compensation should not be a tool to handle risks by a company. Risks should be dealt with on beforehand. Furthermore, the responsibility to ensure that internal policies and legal requirements are followed should not be moved from the employer side to the individual employee.

An employee that has followed the company's official or unofficial routines, rules, instructions or practices and thereby have failed to comply with legal requirements should not suffer from any sanctions, rather the employer needs to change its structure to handle future risks. The responsibility should be on the employer if routines, instructions, corporate culture, praxis, training, supervision or control are inadequate.

Q 19: Are the requirements in Title V sufficiently clear and appropriate?

With regard to paragraph 277 and recovery plans of an institution, NFU wishes to draw the attention of EBA to provisions under BRRD (Directive 2014/59). Neither fixed nor variable remuneration regulated by a collective bargaining agreement shall be written down during exceptional cases as during recovery or resolution (BRRD art 44), despite any paybacks that the institution has to make. An equivalent reference to collective agreements should be made under the abovementioned paragraph 277.

Q 20: Are the requirements in Title VI appropriate and sufficiently clear?

In order to have a full image on disclosure requirements, a reference to all the applicable guidelines would be helpful. They should include requirements under Article 75(1 and 3) of Directive 2013/36/EU (CRD IV) (mentioned only under §321) and the Guidelines on the applicable discount rate and Guidelines on the supervisory review process (mentioned under §311).

This could be done either at the beginning of the chapter, or in an annex, so that references to additional guidelines and the articles in the CRR and CRD are sufficiently clear. The annex 1 of these Guidelines is helpful in this respect.

Q 21: Do institutions, considering the baseline scenario, agree with the impact assessment and its conclusions?

Non-applicable

Q 22: Institutions are welcome to provide costs estimates with regarding the costs which will be triggered for the implementation of these guidelines. When providing these estimates, institutions should not take into account costs which are encountered by the CRD IV provisions itself.

Non-applicable